BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
O'Donnell & Mortimer LLP	)	MUR 5758
f/k/a O'Donnell & Shaeffer LLP	)	
	)	

BRIEF OF O'DONNELL & MORTIMER LLP IN SUPPORT OF NO PROBABLE CAUSE

O'Donnell & Mortimer LLP ("Firm")[1] respectfully submits this brief pursuant to 2 U S C § 437g(a)(3) and urges the Federal Election Commission ("FEC" or "Commission") to find no probable cause that the Firm violated 2 U S C § 441f Accordingly, the Commission should reject the recommendation of the Office of General Counsel

STATEMENT OF THE CASE

The General Counsel's Brief dated October 26, 2006, erroneously postulates that the Firm is liable for the unauthorized, unratified, and personal acts of Pierce O'Donnell, a partner in the Firm The misguided conclusions relate to Mr O'Donnell's personal efforts to raise contributions for the Presidential campaign of Senator John Edwards and personally to reimburse his family members, Firm employees, and others outside of the Firm for contributions to the Edwards campaign

The Firm is not liable either under partnership law or under agency principles for the personal actions of Mr O'Donnell or for the subsidiary and derivative personal activities of Firm employees whom he enlisted All alleged actions by Mr O'Donnell

[1] Formerly known as O'Donnell & Schaeffer LLP and O'Donnell Shaeffer Mortimer LLP Please note that the Firm is in the process of dissolution

were personal in nature and outside the scope of the business of the Firm, which provided legal counsel The alleged actions also did not accrue to the benefit of the Firm, were not related to any client matter, and were not intended to be so The General Counsel's Brief makes clear that no funds of the Firm were used to make any alleged reimbursements

The conclusion of the General Counsel's Brief attributing liability to the Firm based on the personal activities of Mr O'Donnell and others is unsubstantiated by either the facts or the law The Brief rests upon faulty determinations from the facts of this case and from cases where the liability-creating activities were, unlike here, clearly in the scope of the employers' business operations and clearly within the scope of the employees' employment As explained below, this Matter contrasts entirely with those cases Accordingly, the Commission should reject the conclusions in the General Counsel's Brief and should find no probable cause to believe that the Firm violated 2 U S C § 441f

SUMMARY OF FACTS[2]

Throughout the relevant time period, Pierce O'Donnell, a trial attorney, was a partner in O'Donnell & Shaeffer LLP, a firm in Los Angeles that has subsequently gone through a number of name changes and is now in the process of dissolving Mr O'Donnell agreed in 2003 to be a fundraiser for the Presidential campaign of Senator John Edwards Mr O'Donnell organized and hosted a fundraising breakfast for the Edwards campaign on March 1, 2003, at a hotel in Beverly Hills, California Mr O'Donnell's personal assistant from the Firm, Delores Valdez, assisted him with this fundraising event

[2] For purposes of this brief only, we accept as true in the first four paragraphs below facts from pages 3-10 of the General Counsel's Brief The next four paragraphs highlight additional facts from the record Accordingly and for ease of reading, we have not placed the term "allegedly" before every discussion of the facts

Before and after the event, Mr O'Donnell and Ms Valdez solicited contributions from many different persons With personal funds from Mr O'Donnell, they reimbursed the contributions of 16 different persons, four of whom were family members of Mr O'Donnell, and five of whom were employees of the Firm All of these persons were told that they would be reimbursed by Mr O'Donnell Mr O'Donnell wrote personal checks for the reimbursements and did not use Firm funds

A number of other Firm employees, including all of the attorneys who made contributions to the Edwards campaign, did not receive a reimbursement for their contributions, as attested by sworn affidavits in this Matter

At the request of Ms Valdez, three firm employees—office manager Else Latinovic, paralegal Hilda Escobar, and administrative employee Bert Rodriguez—asked family members to contribute to the Edwards campaign, promising, as had Ms Valdez, that Mr O'Donnell would reimburse them

The Firm was a small litigation law firm that specialized in complex litigation matters Affidavit of Ann Marie Mortimer, dated December 14, 2006 ¶ 5 [hereinafter "2006 Mortimer Aff"], attached hereto at Tab A The Firm was not a lobbying firm and was not in the business of reimbursing campaign contributions 2006 Mortimer Aff ¶ 5 Ann Marie Mortimer and Mr O'Donnell were the two equity partners in the Firm Affidavit of Ann Marie Mortimer dated June 10, 2004 ¶ 2 [hereinafter "2004 Mortimer Aff"], attached hereto at Tab B [3] There were 9 other partners in the Firm in 2003, and there were 17 associate attorneys working for the Firm at that time 2006 Mortimer Aff ¶ 6 The Firm did not reimburse any person for their contribution 2004 Mortimer Aff

[3] The 2004 Mortimer Affidavit was submitted with the responses of the Firm on June 14, 2004, (MUR 5366) and June 25, 2004 (MUR 5454)

¶ 8 *See also* Deposition of Bert Rodriguez, dated June 27, 2006, at 79 [hereinafter "Rodriguez Tr "] ("I know that I got a check -- from Pierce"), Deposition of Hilda Escobar, dated June 27, 2006, at 58 [hereinafter "Escobar Tr "] (acknowledging that the check was from Mr O'Donnell's personal account)

The co-managing partner of the Firm, Ms Mortimer, had no knowledge about the reimbursements for the Edwards campaign contributions at the time the contributions and reimbursements were made 2006 Mortimer Aff ¶ 7 *The Hill* newspaper on May 25, 2003, published an article about questionable contributions to the Edwards campaign from employees of law firms Ms Mortimer, however, did not discuss the article from *The Hill* with Ms Latinovic until after the Complaint in this Matter had been filed 2006 Mortimer Aff ¶ 8

Many of the Firm employees who made reimbursed contributions to the Edwards campaign and asked family members to do the same had a deep personal fondness for Mr O'Donnell because he had been so nice to them and generous with them over the years *See, e g* , Rodriguez Tr at 28-29, 58, Escobar Tr at 29-31, 52

DISCUSSION

A. There Is No Direct Liability for the Firm Because No Partnership Funds Were Used to Reimburse Any Contributions

In this Matter, the Firm has no liability for reimbursing contributions to the Edwards campaign As detailed in the General Counsel's Brief (at 5), "these funds all originated from O'Donnell's personal bank account" and "O'Donnell wrote personal checks to these individuals " The testimony in the depositions of Hilda Escobar, Bert Rodriguez, and Else Latinovic show that Mr O'Donnell used personal funds to reimburse the individual contributors and did not use Firm funds This confirms the affidavit

submitted by Ann Marie Mortimer on June 10, 2004, with the second response of the Firm This affidavit is attached hereto at Tab B

Since there was no use of Firm funds for any reimbursements, the Firm cannot be held liable for violations of section 441f As a result, in an inexplicable effort to trap persons not involved in, and without knowledge of, illegal activity, the Office of General Counsel has moved down the inappropriate path of asserting vicarious liability for a "knowing and willful" violation of section 441f on the part of the Firm Such vicarious liability, however, does not attach to the Firm as is shown below

B. **All Activity Undertaken by Mr. O'Donnell and Firm Employees Was Personal in Nature, Outside the Scope of the Firm's Business and Their Employment, and Not in Furtherance of Firm Business**

As shown above in the discussion of the lack of direct liability for the Firm, all of the facts in this case point to one conclusion about the nature of the campaign finance activity undertaken by Mr O'Donnell and certain Firm employees the activity was personal in nature There is no evidence that the fundraising and reimbursement activity was a Firm project, was related to Firm activity, or was for the benefit of the Firm or a Firm client Moreover, there also is no evidence that the Firm was in the business of political fundraising or of reimbursing contributions or that such activity is the type of business that law firms in California usually undertake [4]

Instead, using his personal funds, Mr O'Donnell sought to fulfill a personal commitment to the Edwards campaign by drawing on all types of personal attachments,

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[4] In a recent decision, the U S Supreme Court set a high bar for partnership vicarious liability for employee actions under the "knowing" standard of a different statute *Arthur Andersen LLP v U S*, 544 U S 696 (2005) In the case at hand, not only does the Commission lack evidence of "knowing and willful" conduct on the part of the other partners and the Firm, it also lacks facts of institutional involvement and of institutional knowledge through firm policies

including non-Firm family relationships The Firm employees voluntarily and personally (although perhaps not happily) assisted Mr O'Donnell with his personal problem Since the other partners of the Firm clearly did not approve this activity, did not ratify this activity, and did not even know of this reimbursement activity, the Firm cannot be vicariously liable for such activity—either through the law of partnership or the principles of agency The facts that the fundraising and reimbursement activity was personal in nature, was not in the scope of the Firm's business or the employee's responsibilities, and did not benefit or further the interests of the Firm all buttress this conclusion [5]

1 **Under Partnership Law, the Firm Is Not Vicariously Liable Because Mr. O'Donnell's Personal Reimbursement Activity Was Outside the Scope of the Firm's Business**

a **The Law Requires Activity to Be within the Scope of the Business**

Under California law and without the approval of all of the remaining partners, a partnership will be liable for the acts of a partner only if the partner acted within the usual course of business of the partnership "An act of a partner that is not apparently for carrying on in the ordinary course of the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners " Cal Corp Code § 16301(2) "A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or

[5] The Firm was not reprimanded or charged in the Los Angeles Ethics case involving the Hahn Los Angeles contribution reimbursements, although the Firm's situation in that case vis-à-vis Mr O'Donnell's personal reimbursements was the same as in this Matter – no knowledge, no involvement, no Firm funds used 2006 Mortimer Aff ¶ 9 *See also Stipulation, Decision, and Order of the Los Angeles City Ethics Commission*, Case No 2003-56 (Mar 14, 2006)

other actionable conduct, of a partner *acting in the ordinary course of business of the partnership or with authority of the partnership*" *Id* § 16305(1) (emphasis added)

"The status of partner, without more, provides only the authority to bind the partnership by acts 'which are apparently within the usual course of the particular business' of the partnership" *Milazo v Gulf Ins Co*, 274 Cal Rptr 632 (Cal Ct App 1990) (quoting *Owens v Palos Verdes Monaco*, 191 Cal Rptr 381, 387 (Cal Ct App 1983)) "A partner, without the consent of *all* of the remaining partners, has no authority to do any act which is not apparently done for the purpose of carrying on the partnership business in the 'usual way'" *Id* (quoting Cal Corp Code § 15009(2), (3)(c) (now Cal Corp Code § 16301)) (emphasis in the original) Mr O'Donnell's reimbursements and fundraising were not in the usual course of the Firm's business and were not known to, let alone consented to by, the other Firm partners

b The Cases Cited in the General Counsel's Brief Are Inapplicable

The General Counsel's Brief (at 14 n 11) merely makes note of the first provision of the above-quoted section of the California Corporation Code, which *still* indicates that liability only attaches to a partnership for the acts of the partner if the act is "for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership" Cal Corp Code § 16301(1) The Brief then presumes that Mr O'Donnell's personal actions fit this provision and were in the scope of the Firm's business Nowhere in the partnership discussion, however, does the Office of General Counsel put forward any facts to undergird its supposition Moreover, the partnership cases cited by the Office of General Counsel provide no factual analogy to support its assertion *Redman v Walters*, 152 Cal Rptr 42 (Cal Ct App 1979), for

example, involved an attorney failing to prepare and prosecute a case, an omission in the engagement of a legal practice The second offered case, this time in tort, involved a partner's driving of a car when drunk and on a "partnership mission" *Masden v Cawthorne*, 85 P 2d 909 (Cal Ct App 1938) From the facts involved in both of these cases, then, there was no dispute that the partner's actions were within the scope of the partnership's business

c The Activity in this Case Were Personal

In this Matter, however, the acts of the partner in question were personal and outside the scope of the Firm's business First, the Firm's business is the practice of law, not lobbying or political fundraising [6] Second, Mr O'Donnell made a personal commitment to the Edwards campaign Third, Mr O'Donnell used personal funds to reimburse certain contributors Fourth, reimbursed contributors included family members not connected to the Firm Fifth, Mr O'Donnell did not reimburse contributions from attorneys at the Firm, including contributions from other partners Moreover, there is no evidence that the Firm benefited or would benefit from the illegal campaign finance activity undertaken by Mr O'Donnell or that the campaign finance activity was a type of business engaged in by law firms

d Personal Activity Does Not Trigger Vicarious Liability

As stated above, for vicarious liability to attach to the Firm through partnership law it is necessary for the offending activities to have been carried on in the scope of the partnership's business In *Ellis v Mihelis*, 384 P 2d 7 (Cal 1963), for example, a purchaser sought specific performance of an agreement to sell a ranch operated by a

[6] The Firm was a small law firm specializing in complex litigation, and, unlike the law firm in MUR 4530 (Paulus), the Firm did not engage in lobbying activities

partnership One of the partners had executed the sales agreement without revealing the existence of the partnership The court examined whether one partner could bind the other under Cal Corp Code § 15009 (now Cal Corp Code § 16301) without a written agency agreement *Id* at 13-14 The court summarily noted that "there is no evidence that defendants were in the business of buying and selling real estate or that the sale of the ranch was in the usual course of the partnership business" *Id* at 13 The court explained that "there must be express authority for acts of a partner which do not appear to be in the usual course of the business" *Id* at 14 The court concluded, "Since it does not appear that the sale of the ranch was in the usual course of the partnership business, a contract to sell it would come within subdivision (2) of section 15009, not subdivision (1), even if the ranch were a partnership asset as found by the trial court" *Id* *See also Waller v Engelke*, 741 P 2d 385 (Mont 1987) (finding no vicarious liability for actions of a partner outside the usual course of the partnership business), *Hodge v Garrett*, 614 P 2d 420 (Idaho 1980) (same), *Sheridan v Desmond*, 697 A 2d 1162 (Conn App. Ct 1997) (same), *Pa Liquor Control Bd v Pollock*, 484 A 2d 206 (Pa Commw Ct 1984) (same)

Similar to the above case, the Firm is in the business of providing legal services and not in the business of lobbying, political fundraising, or reimbursing personal contributions to candidates The Office of General Counsel provides no evidence, and can provide no evidence, to the contrary Mr O'Donnell's personal actions, therefore, went beyond those of the usual business of the Firm

e **There Is No *Per Se* Rule of Vicarious Liability for Law Firms**

Moreover, unlike what the Office of General Counsel effectively asserts (*see* pp 14-17), there is no rule in California that makes a partnership *per se* vicariously liable

for all activities undertaken by partners within the facilities of the partnership In fact, in other states even seemingly normal law-related activities by a law firm partner have been held not to trigger vicarious liability for the law firm when they went above and beyond what a normal law firm would do (commissions versus omissions) In *Jackson v Jackson*, 201 S E 2d 722, 723 (N C Ct App 1974), for example, the court held that "[a]dvising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, but taking such action maliciously and without probable cause is quite a different matter" After considering the state ethics rule prohibiting prosecution without cause, the court stated that "it cannot be held that malicious prosecution is within the ordinary course of business of a law partnership" *Id* at 724 In the case of the Firm, on the other hand, it is elementary that reimbursing campaign contributions is not within the ordinary course of business of a law partnership

f Mr. O'Donnell, in His Personal Capacity, Attempted to Extinguish a Personal Commitment, Which Is Not the Business of a Law Partnership

In effect, Mr O'Donnell wore two hats when at the Firm—one personal and one for the Firm When engaged in illegal campaign finance activity, he wore his personal hat These personal activities related to paying off his personal obligation or debt to the Edwards campaign, an activity which, according to California courts, is not the business of partnerships *See Tsakos Shipping & Trading, S A v Juniper Gardens Town Homes, Ltd*, 15 Cal Rptr 2d 585, 595 (Cal Ct App 1993) (finding partnership not liable for loan made to partnership's co-managing partner because "'[t]he normal partnership is organized to carry on a business for its members, and not to assist other persons by becoming a surety for them, or answerable for their debts'") (quoting *Mayr v Goldschmidt*, 218 P 621, 622 (Cal Ct App 1923)) Recently, a federal court in

California acknowledged that vicarious liability cannot attach to a partnership for actions of partners when they are wearing their non-partnership hats, engaging in non-partnership business, and not furthering the business of the partnership *See Synapsis, LLC v Evergreen Data Sys , Inc* , No C-05-01524, at * 5, 2006 WL 2619361 (N D. Cal Sept 12, 2006) (finding partnership not liable for statements of partners when engaging in business for another of the partners' businesses where plaintiff "provided no evidence tending to show that it was the [partnership's] ordinary course of business to provide assurances that it would stand behind companies in which it had no ownership interest" and "no evidence that [the partners] made [the potentially liability-triggering statements] in the ordinary course of [the partnership] business or to further the interests of [the partnership]")

Instead of omitting to take some action required in the Firm's or his practice of law, Mr O'Donnell performed acts unrelated to the legal practice in the course of his personal fundraising activity, intending to extinguish a personal commitment The Office of General Counsel has no evidence to show that Mr O'Donnell's reimbursement activity was in the scope of the Firm's business or even within the scope of what law firms normally do Instead, all logical deductions from the facts go the other way The FEC, then, may not subject the Firm to vicarious liability under California's partnership law for the personal undertakings of one of its partners, Mr O'Donnell

2 Under Principles of Agency, the Firm Is Not Vicariously Liable Because the Personal Reimbursement Activity Was Outside the Scope of the Firm's Business and Was Not Intended to Benefit the Firm

In addition to the arguments made under partnership law, the General Counsel's Brief also inappropriately ascribes vicariously liability for a "knowing and willful" violation of section 441f to the Firm through the principles of agency law, arguing that

the actions of Mr O'Donnell and certain Firm staff trigger Firm liability through *respondeat superior* The Office of General Counsel, however, makes assumptions about the facts in this case and misapplies accepted agency principles Indeed, because the actions by Mr O'Donnell and certain Firm employees were outside the scope of their employment and were not for the benefit of the Firm, the actions do not trigger ordinary civil vicarious liability for the Firm, much less vicarious liability for a "knowing and willful" violation

Under the Restatement (Second) of Agency § 219(1), a master is subject to liability for actions of its servants only when the servants are "acting in the scope of their employment " The principal is not liable for actions of servants "acting outside the scope of their employment" except in certain situations inapplicable and not argued by the Office of General Counsel here Restatement (Second) of Agency § 219(2) Among other things, for an action to be within the scope of a servant's employment, the action must be "actuated, at least in part, by a purpose to serve the master " *Id* § 228(1) "Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master " *Id* § 228(2) (emphasis added)

a The Reimbursement Scheme Did Not Serve and Was Not Intended to Serve the Firm

A purpose to serve the Firm is clearly what is missing from this case Mr O'Donnell was reimbursing contributions with his personal funds to extinguish a personal commitment that he had made to the Edwards campaign There is no evidence that he undertook the reimbursement activity to serve the Firm, for it had nothing to do with his duties to practice law As a subsidiary and derivative matter, certain Firm

employees, too, effectuated Mr O'Donnell's personal conduct, which was not a program of the Firm since it was done in secret, in hushed tones, with non-Firm family members and friends, and without the knowledge or participation of other Firm partners or attorneys The conduct also did not involve any client of the Firm The depositions are replete with statements that the conduct was an effort to assist Mr O'Donnell and that "Pierce" and not the Firm was going to reimburse contributions *See, e g*, Rodriguez Tr at 68, Hannober Tr at 48, 52 In the end, it was an extracurricular activity on the part of the participants According to Judge Posner, "when an agent acts entirely on his own behalf, doing things that could not possibly be interpreted as the merely overzealous or ill-judged performance of his duties as agent, he is acting outside the scope of the agency and the principal is not bound " *Hartmann v Prudential Ins Co*, 9 F 3d 1207, 1210 (7th Cir 1993)

b The General Counsel's Brief Assumes Incorrectly that the Illegal Activity Was In the Scope of Employment

The Office of General Counsel, in its Brief, essentially makes an assumption that the illegal actions of Mr O'Donnell and certain Firm employees were in the scope of their employment For this proposition, the Brief cites the use of Firm resources for solicitations (letterhead) and the supposed lack of distinction between Firm commands and the personal requests of Mr O'Donnell

The cases cited by the Office of General Counsel, however, fail to transform these two facts into liability for the Firm, for the Restatement (Second) clearly states that the actions must serve the master and that the fact that activities take place in the office during work hours is not enough *See* Restatement (Second) of Agency § 228 In *Hanlester Network v Shalala*, 51 F 3d 1390 (9th Cir 1995), cited by the Office of

General Counsel, the fraud in question occurred in selling limited partnerships, which was the basic job function of the pertinent employee In *United States v Hilton Hotels*, 467 F 2d 1000 (9th Cir 1972), the analysis was under the Sherman Act, under which almost all collusive or monopolization activity is assumed to be directed toward the benefit of the employer in that such activity is intended to raise profits In *United States v A&P Trucking Co*, 358 U S 121 (1958), the vicarious liability related to an employee or employees in the trucking industry not fulfilling the requirements of the trucking regulations In short, *A&P Trucking Co* involved regulatory omissions related to the business of the employer None of these cases extends liability, much less knowing and willful liability, to a principal from the personal, extracurricular activity of an agent serving the personal political interests of another agent where such personal interests have no relation to the object or business of the employer

The Office of General Counsel would have the Commission believe that once Mr O'Donnell and certain employees entered the Firm's offices, nothing could take them out of the scope of their employment That is not the view of courts under the Restatement (Second), for it is widely recognized that agents, during work hours and at employer facilities, can embark on a "frolic of their own" that has nothing to do with their employment [7] *See, e g, Southern South, Inc v Lee*, 391 So 2d 990, 995 (Miss 1980) In *Entente Mineral Co v Parker*, 956 F 2d 524 (5th Cir 1992), the Fifth Circuit found that an attorney's actions, even though partly undertaken in the workplace and during work hours, were not within the scope of his employment The plaintiff in that case sought to

[7] The arguments of the Office of General Counsel would mean that, if Mr O'Donnell and certain employees of the Firm conspired at the office to steal a car for their own personal amusement and in fact did steal a car, then the Firm would be vicariously liable for the illegal activity This is an unfair result unsupported by law

hold a law firm vicariously liable for an attorney's tortious interference with the plaintiff's business relations The attorney initially represented a client who was selling a royalty interest to the plaintiff An initial meeting between the plaintiff, the seller, and the attorney took place at the attorney's law firm Later, upon discussing the matter with others at the firm and making other inquiries while apparently still at the firm's office, the attorney decided to buy the interest for himself *Id* at 525 Nevertheless, the court held that the attorney had abandoned his employment and the law firm was not liable for the attorney's tort *Id* at 528-29 The court rejected the plaintiff's argument to the effect that "once [the attorney] began representing [the seller] pursuant to the firm's purposes, no deviation from the firm's purpose could take him outside the scope of his employment " *Id* at 528 Rather, the court found that the attorney was "acting in his own interest, not in the interest of the firm" and "the firm did not receive any benefit from [the attorney's] purchase of the realty " *Id* Therefore, the attorney "could not have been acting within the scope of his employment when he purchased the royalty interest " *Id*

This is exactly what happened in this case Not only did Mr O'Donnell deviate from his Firm business and undertake allegedly illegal activity with indifference to its effect on the Firm, but he also enlisted others to deviate from their Firm activities and to help with his personal endeavor The particular Firm employees, in turn, engaged in their own personal conduct to assist Mr O'Donnell, either out of personal fealty, *see, e g* , Rodriguez Tr at 28-29, 58, Escobar Tr at 29-31, 52 (showing deep personal affection for Mr O'Donnell), or because of fear of his temper, *see* Deposition of Else Latinovic, dated June 26, 2006, at 43 [hereinafter "Latinovic Tr "] (as to prior Los Angeles contributions)

These employees even involved persons outside of the Firm, all the while keeping the conduct hidden from the nine other partners and 17 associate attorneys There is no evidence that the employees believed the reimbursement conduct was a project or undertaking of the Firm rather than of Mr O'Donnell The employees did not undertake the project in the spirit to serve the Firm's interest, but to help someone who had helped them

c To Accord with Past Law Firm Cases, the Commission Should Find Mr. O'Donnell's Activity Outside the Scope of Employment

The scope of employment is essentially a finding of fact Here, the facts show that Mr O'Donnell and certain Firm employees did not serve the Firm when they organized and undertook the illicit reimbursement scheme In other matters involving law firms and illegal activities by partners or employees, the Commission, through conciliation agreements or decisions, ultimately did not hold the law firms liable for the illegal activities of the individuals even when, unlike here, the illegal activity related to a client or client matter *See, e g*, MUR 4530 (relating to Hogan & Hartson LLP), MUR 5092 (relating to Thompson Coburn LLP) Accordingly, as many courts have done and as the Commission has done on several occasions, the FEC should find that the illegal activity of the individuals in this case was outside the scope of their employment and does not trigger vicarious liability for the Firm

d The Reimbursement Activity Did Not Benefit the Firm and Cannot Serve as the Basis for "Knowing and Willful" Liability

Section 437g of the Act references "knowing and willful" violations of the Act, including section 441f Under section 437g, there are higher civil penalties for those persons found to have violated a provision of the Act in a "knowing and willful" manner

See 2 U S C § 437g(a)(5) & (6)(C) Importantly, the "knowing and willful" standard is the same standard that triggers criminal liability under Title 18 for violations of the Act *Id* § 437(g)(d)

In the case of criminal liability, such as the liability that is triggered by a "knowing and willful" violation of the Act, federal courts require a still-higher showing in order for vicarious liability to attach to the employer of the offending individual In short, the agent's actions must benefit the employer *U S v Hilton Hotels*, 467 F 2d at 1006 n 4 According to the Deputy Attorney General of the Department of Justice, "[t]o hold a corporation liable for [the illegal acts of its directors, officers, employees, and agents], the government must establish that the corporate agent's actions (i) were in the scope of his duties and (ii) were intended, at least in part, to benefit the corporation " Paul J McNulty, Deputy Attorney Gen , U S Dep't of Justice, *Principles of Federal Prosecution of Business Organizations*, Mem to Heads of Dep't Components & U S Attorneys, U S Dep't of Justice 2 (Dec 12, 2006), http //www usdoj gov/dag/speech/2006/mcnulty_memo pdf [hereinafter "McNulty Memorandum"] *See also id* at 1 n 1 (applying same principle to the prosecution of partnerships), *OKI Semiconductor Co v Wells Fargo Bank, Nat'l Assoc* , 298 F 3d 768, 775 (9th Cir 2002) (holding that liability attaches only if an employer benefited from its employee's RICO violation)

There is no evidence that Mr O'Donnell intended to benefit the Firm by reimbursing others for contributions to the Edwards campaign [8] There is no evidence that

[8] Please note that the Office of General Counsel has not recommended that the Commission find probable cause to believe that any individual other than Mr O'Donnell made a "knowing and willful" violation of section 441f, therefore, this section only discusses Mr O'Donnell's activities

the Firm did so benefit There is no evidence that the Firm had or sought business with the campaign, and the Firm, as a non-lobbying firm, had no interest in legislative influence of the Senator *Compare* MUR 4530 (Psaltis) Unlike the situations in MUR 4530 (Psaltis) and MUR 5092 (Lazaroff) where the law firms were ultimately released from liability (in the conciliation agreement in MUR 4530), the illegal activity in this case did not have any connection to a client or client matter The illegal activity was wholly independent of the Firm's business Mr O'Donnell undertook the illegal activity to extinguish a personal commitment to the Edwards campaign that Mr O'Donnell incurred in his own name and for his own political benefit

Without evidence of a benefit to the Firm or even an intent to benefit the Firm on the part of Mr O'Donnell, the FEC cannot find that the Firm is vicariously liable for his violating section 441f at the criminally equivalent standard of "knowing and willful " The Commission is left with ordinary vicarious liability, but, as explained above, that also does not attach to the Firm because of partnership law and the principles of agency

C. <u>Subsequent Actions by Firm Do Not Trigger Liability for the Firm</u>

In the Brief, the Office of General Counsel attempts to explain why it is seeking vicarious liability against the Firm even though seeking such liability is not the normal course of action for the Commission In its explanation, the Office of General Counsel also uses the discussion to put forward additional reasons why vicarious liability should attach to the Firm In the end, the Office of General Counsel is in error about the attachment of vicarious liability to the Firm by virtue of its subsequent actions (or assumed actions) and its responses in this case Given the facts of this case and the non-involvement of the other partners of the Firm, the Commission should cease to pursue vicarious liability

1 **The Firm's Paying the Legal Fees of Employees Provides No Evidence for the Scope of Employment**

The Office of General Counsel (at 15-16) points to, as one evidence of the scope of employment, information that the Firm was paying for the attorneys for implicated staff and others The Office of General Counsel, however, does not and cannot point to any cases where vicarious liability was imputed to an employer for paying attorneys' fees of employees so that the staff could receive adequate representation in court and before administrative agencies In fact, there are cases where courts have explicitly refused to take the payment of employee legal fees into account when determining the vicarious liability of the employer *See, e g , Plancarte v Guardsmark, LLC*, 13 Cal Rptr 3d 315, 320, 322 (Cal Ct App 2004) (finding that it was in the employer's interest that the employee "have adequate and reliable representation" and finding no "rule that an employer who has been informed of the material facts regarding an employee's alleged tortious acts and still provides a defense for the employee has, ipso facto, ratified those acts and made itself potentially liable for them") Indeed, a U S district court recently held as unconstitutional efforts by the federal government to prevent employers from paying for attorneys for its employees *U S v Stein*, 435 F Supp 2d 330, 364-65 (S D N Y 2006)

Moreover, recently-issued advice from the Department of Justice indicates that the Department will only take the payment of legal fees for employees into account "in extremely rare cases" where "the circumstances show that it was intended to impede a criminal investigation " McNulty Memorandum at 11 n 3 The Office of General Counsel does not and cannot point to any evidence that the Firm acted "improperly to

shield itself and its culpable employees from government scrutiny," *id*, by paying the legal fees of the employees

2 The Firm Has Cooperated

Contrary to the assertions in the General Counsel's Brief that the Firm has withheld information from the Commission, the Firm has fully cooperated with the Commission and its staff First, it submitted a brief initial response to the Commission, denying that the Firm had reimbursed anyone—a response that has held up even in the General Counsel's Brief Second, the Firm submitted a subsequent response on June 25, 2004, further demonstrating that the Firm had not reimbursed anyone and included an affidavit from the co-managing partner to that effect Third, the Firm promptly has complied with discovery requests from the Commission, searching all of the files of Firm computers, providing detailed descriptions of past and present employees, and providing reports of compensation paid

The Firm should not be targeted for what the Commission has not asked of it The Commission has not requested a deposition or interview with the co-managing partner The Commission also has not asked detailed questions of the Firm, other than what was included in discovery The Office of General Counsel complains that the Commission has not received full information from the Firm on the activities of other persons This is a puzzling position, for the Firm has responded to all requests from the Commission Moreover, it did not have full information about the activities that took place since they were personal activities and done in secret Surely the Office of General Counsel is not suggesting that the Firm should have voluntarily speculated about unasked questions and provided speculative answers

Instead of targeting the Firm for vicarious liability, the Commission should find no probable cause to believe that the Firm violated section 441f The Firm did not reimburse anyone for any contribution Mr O'Donnell used no Firm funds for such reimbursements None of the other partners were aware of the reimbursement scheme that Mr O'Donnell concocted to extinguish his personal political and financial commitment Moreover, the Firm has cooperated with all requests from the FEC and presented evidence of its own innocence

3 The Firm Was Not Aware of the Reimbursements at the Time They Were Made

The Firm, through the co-managing partner, was not aware of the illegal Edwards campaign reimbursements at the time they were made 2006 Mortimer Aff ¶7 *See also* Latinovic Tr at 111 (stating that she did not inform the managing partners of the reimbursement scheme) Contrary to the deposition testimony of Ms Latinovic, Ms Latinovic did not discuss the precipitating article from *The Hill* with Ms Mortimer, the co-managing partner, until after the Complaint had been filed 2006 Mortimer Aff ¶8

Nevertheless, even if the Firm had known about the reimbursements prior to the Complaint, there is no legal obligation in the Act or elsewhere (as admitted by the Office of General Counsel) to report illegal activity to the FEC Unlike the law firm in MUR 5092 (Lazaroff), it was not possible for the Firm to report any reimbursement activity because no other partner or even attorney was involved in Mr O'Donnell's personal scheme In the Lazaroff case, several other partners and attorneys participated in making reimbursed contributions and could submit testimony based on direct knowledge Without such direct knowledge and the complete facts, the Firm here could only respond

to the FEC with the information in its possession, and it did so In no way should this be thought of as stonewalling the Commission or withholding information

4 The Conciliation Agreement in MUR 4530 (Psaltis) Is No Precedent

The Office of General Counsel argues that the Commission action in MUR 4530 (Psaltis) serves as a precedent for going after the Firm for vicarious liability in this Matter The facts and legal issues involved in that case, however, highlight how MUR 4530 is no precedent whatsoever

First, the nature of the conclusion of MUR 4530 indicates that it has no precedential value In the conciliation agreement in MUR 4530 between the law firm Hogan & Hartson L L P and the FEC, found at http //eqs nictusa com/eqsdocs/0000034E pdf, the law firm did not admit or deny its general liability, much less vicarious liability for a "knowing and willful" violation by one of its employees or partners

Second, the analysis of the Commission's probable cause action with respect to Hogan & Hartson must take into account the facts of that case, which differ from the facts of this Matter In MUR 4530, the primary Firm employee implicated was a lobbyist and the law firm engaged in lobbying activities—a situation where the Commission might view contribution-related illegal activity with greater suspicion given the interaction of lobbyists and Members of Congress In this case, the Firm does not engage in lobbying activities Moreover, the violation in MUR 4530 involved a contribution from a foreign national, whereas the case at hand involves contributions in the name of another

Finally, the violation by the lobbyist in MUR 4530 related to a client matter, which contrasts to the facts in this case Here, the illegal activity was wholly unrelated to Firm clients

In short, the conciliation agreement in MUR 4530 did not establish as a matter of law that law firms must be held vicariously liable for instances of personal illegal activity undertaken by partners and staff Accordingly, MUR 4530 is no precedent for going after the Firm Looking at the facts of this case, it is clear that the Firm had no knowledge or involvement in Mr O'Donnell's personal scheme

CONCLUSION

The Commission lacks evidence that the personal actions by Mr O'Donnell and certain Firm employees trigger vicarious liability either at the normal or the "knowing and willful" level for the Firm--through partnership law, agency principles, or otherwise The illegal activities were outside the scope of the Firm's business, outside the scope of the agents' employment, wholly independent of Firm clients, and did not benefit the Firm Instead, the reimbursement scheme was a "frolic of his own," a personal undertaking to extinguish a personal political and financial commitment to the Edwards campaign by Mr O'Donnell for his own personal benefit As a matter of law, the Firm may not be held liable under these facts

For all of the above-stated reasons, the Commission should find no probable cause to believe that the Firm violated 2 U S C § 441f

Respectfully submitted this 14th day of December, 2006,

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